Federal Court of Appeal | Cour d'appel fédérale

Date: 20101026

Docket: A-46-08

Citation: 2010 FCA 283

CORAM: **NOËL J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

THE RIGHT HONOURABLE JEAN CHRÉTIEN

Respondent

and

THE HONOURABLE JOHN H. GOMERY, IN HIS QUALITY AS EX-COMMISSIONER OF THE COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

Mis en cause

Heard at Ottawa, Ontario, on October 26, 2010.

Judgment delivered from the Bench at Ottawa, Ontario, on October 26, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 26, 2010.)

NOËL J.A.

[1] This is an appeal by the Attorney General of Canada (the appellant) from a judgment of Teitelbaum D.J. of the Federal Court (the Applications Judge) wherein he granted the application

for judicial review brought by The Right Honourable Jean Chrétien (the respondent) and quashed the findings made by The Honourable John H. Gomery, in his capacity as Commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Commission) insofar as they relate to the respondent on the ground that there was a reasonable apprehension of bias on the part of Commissioner Gomery against the respondent.

[2] In support of his appeal, the appellant alleges two errors: first, the Applications Judge applied the reasonable apprehension of bias test "too rigidly"; second, he committed a palpable and overriding error in his appreciation of the evidence by interpreting general statements as proof of bias against the respondent and by wrongly attributing to the Commissioner comments made by the Commission's spokesperson.

[3] With respect to the first allegation, the appellant concedes that the Applications Judge properly identified the applicable test. However, he claims that the Applications Judge was too rigid in applying this test. This arguably gives rise to a mixed question of fact and law to be reviewed on a standard of correctness if an extricable question of law can be identified. However, the appellant concedes that no such question arises. Hence, as with the other issue raised on appeal, the appellant cannot succeed unless he shows that the Applications Judge committed a palpable and overriding error.

[4] At the heart of this first attack is the contention that, although the Applications Judge properly identified the test and the difference between a bias analysis in a judicial setting and in the context of a commission of inquiry, he nevertheless failed to give effect to this distinction.

[5] We respectfully disagree. The applicable test was hotly debated in the Court below and the Applications Judge made extensive references to the applicable test in the context of a commission of inquiry (reasons, paras. 67 to 74). His reasons show that he was mindful of the distinction throughout. We refer in particular to his conclusion that it is the "cumulative effect" of the numerous events recounted in the course of his reasons which led him to the conclusion that he reached (reasons, paras. 80 and 106). We reject the contention that the Applications Judge misapplied the test.

[6] That said, to the extent that the appellant is asking us to consider the evidence as a whole and determine whether on a proper application of the test, the Applications Judge could come to the conclusion that he did, we hold in the affirmative.

[7] The appellant also made specific reference to what has been described as the "golf ball episode" and argues that the conclusion drawn by the Applications Judge from this episode (reasons, paras. 93 and 94) shows that he applied the test "too stringently" (memorandum of the appellant, para. 47). This according to the appellant becomes "starkly apparent" when regard is had to the "restrained and moderate" conclusion drawn by the Commissioner with respect to the respondent (*idem*, para. 48).

[8] As to this last point, the plain conclusion reached by the Commissioner is that the respondent was to be blamed (reasons of the Commissioner, appeal book, p. 1682). Labeling this conclusion as “restrained and moderate” does not alter the actual conclusion reached by the Commissioner with respect to the respondent. As to the Applications Judge’s appreciation of the “golf ball episode”, it has not been shown to be unreasonable when regard is had to the evidence before him. We should add that in advancing this argument the appellant again fails to recognize that the ultimate decision reached by the Applications Judge is not based on any single event, statement or occurrence, but on all those which he identified in the course of his reasons, when “viewed cumulatively” (reasons, paras. 80 and 106).

[9] As to the Applications Judge’s reliance on general statements in order to find that there was a reasonable apprehension of bias as against the respondent, we can detect no reviewable error. In particular, it was open to the Applications Judge to hold that these general statements could be viewed as directed against the respondent for the reasons that he gave (reasons, paras. 87 and 88).

[10] As to the Applications Judge’s conclusion that certain statements made by the Commission’s spokesperson were to be attributed to the Commissioner, we again can detect no reviewable error. Indeed, there was a strong evidentiary foundation for the conclusion reached by the Applications Judge on this point (reasons, paras. 89 to 92).

[11] Finally, in response to the appellant's contention that more flexibility in communications with the media should be afforded to commissions of inquiry, we specifically endorse the comments of the Applications Judge at paragraphs 103 to 105 of his reasons.

[12] The appeal will be dismissed with costs in favour of the respondent.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-46-08
(APPEAL FROM A JUDGMENT OF THE THE HONOURABLE MAX M. TEITELBAUM DATED JUNE 26, 2008, NO. T-2118-05.)	
STYLE OF CAUSE:	The Attorney General of Canada and The Right Honourable Jean Chrétien and The Honourable John H. Gomery, in his quality as ex-commissioner of the Commission of inquiry into the sponsorship program and advertising activities
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 26, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	Noël, Trudel, Mainville JJ.A.
DELIVERED FROM THE BENCH BY:	Noël J.A.

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